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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-454

CALVIN LOUIS BRANNON, *Petitioner*,

v.

THE STATE OF NORTH CAROLINA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Calvin Louis Brannon, petitioner herein, prays that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals, an appeal and petition for a writ of certiorari therefrom having been dismissed by the Supreme Court of North Carolina by judgment entered June 26, 1975.

CITATION TO OPINION BELOW

The original opinion of the Supreme Court of North Carolina dated June 26, 1975, has been reported in 287 N. C. 665. This opinion appears in the Appendix hereto as Exhibit A.

The judgment of the North Carolina Supreme Court dismissed the appeal of the petitioner from an adverse opinion of the North Carolina Court of Appeals, which opinion is hereto attached as Exhibit B. The opinion of the North Carolina Court of Appeals is reported in 25 N.C. App. 635, 214 S.E.2d 213.

JURISDICTION

The judgment of the Supreme Court of North Carolina is dated June 26, 1975, and was entered on the same day. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the State can violate the doctrine of the fruits of the poisonous tree by refusing to consider evidence of an illegal search not disclosed in the affidavit for the search warrant but disclosed by the evidence?

2. Can the State violate the petitioner's constitutional right against unreasonable search and seizure, guaranteed by the Fourth Amendment to the Constitution of the United States, by validating a search warrant issued more than twelve hours prior to the search warrant affidavit?

3. Can the petitioner show that the allegations of a search warrant affidavit are false?

STATEMENT OF CASE

This action was commenced by a warrant issued for the arrest of the petitioner, Case Number 72CR47396, on November 21, 1972, by the Deputy Clerk of Superior Court of Forsyth County upon the sworn complaint

of George O. Gunter dated November 21, 1972 which complaint and warrant reads as follows:

HISTORY OF THIS LITIGATION

Complaint for Arrest

The undersigned George O. Gunter, being duly sworn, complains and says that at and in the county named above and on or about the 21st day of October, 1972, the petitioner named above did unlawfully, willfully, and feloniously steal, take, and carry away three dogs, to wit: two black and tans, both approximately 6 years of age, one answering to the name of Jack and the other Fireball, and one treeing walker answering to the name of Drummer Boy, age 15 months, value of the dog named Jack being $350.00, Fireball being $200.00 value, and the dog named Drummer Boy being $200.00, the property of George O. Gunter.

The offense charged here was committed against the peace and dignity of the State and in violation of law G. S. 14-84.

Warrant for Arrest

To any officer with power to execute an arrest warrant for the offense describe above:

It appearing from the accusations recited in the above complaint, which is made a part of this warrant, that a criminal offense has been committed, you are commanded forthwith to arrest the petitioner named above and bring him before 21st District Court, Criminal Division, Winston-Salem, N. C. to be dealt with according to law.

This the 21st day of November, 1972.

The warrant upon the complaint of George O. Gunter was served by arresting the petitioner on November 27, 1972.

This warrant was consolidated for the purpose of trial by presiding Forsyth County District Court Judge, Robert K. Leonard, on January 11, 1973 and after trial of the petitioner upon his pleas of not guilty as to both of the charges in the warrants before presiding District Court Judge, Robert L. Leonard, the petitioner was found guilty and the warrants consolidated for the purpose of sentence and the petitioner sentenced to be imprisoned in the jail of Forsyth County for 18 months and assigned to North Carolina Department of Corrections on January 11, 1973.

From the foregoing Judgment of District Court Judge, Robert K. Leonard, of Forsyth County, the petitioner appealed to the Superior Court of Forsyth County on January 11, 1973.

The petitioner was tried at the regular term of the Superior Court of Forsyth County that began the 4th day of June, 1973.

The trial commenced June 4, 1973 and both of the warrants set forth in the jurisdiction of the court were consolidated for the purpose of trial and the charges in both warrants were tried at one and the same time.

Before the petitioner was arraigned, he made a motion to suppress the evidence obtained on October 22, 1973 because of illegal search and the presiding judge stated that the motion to suppress would be considered when the objection is made during the trial.

The petitioner entered a plea of not guilty to each charge contained in the warrants and was tried by a judge and jury.

The petitioner was found guilty by the jury on the charges contained in each of the warrants set forth in

the jurisdiction of the court and from the judgments entered appealed to the Court of Appeals of North Carolina.

The Court of Appeals of North Carolina reversed as to the other charge, and granted a new trial of the charge of larceny of the Gunter dogs in Case 72CR-47396 in decision recorded in 21 N.C. App. 464, 204 S.E.2d 895 (1974).

The petitioner on August 23, 1974 filed a motion to suppress in Case 72CR47396 the dog leash and any and all evidence seized by officers on October 22, 1973 from the petitioner's vehicle as follows:

Motion to Suppress

The petitioner, Calvin Louis Brannon, moves to suppress one leather dog leash and any and all evidence seized by officers on October 22, 1973 from the petitioner's vehicle for violation of his Constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States as follow:

(1) The arrest warrant under which the officers proceeded was void.

(2) The arrest warrant upon which the officers proceeded was not supported by sufficient affidavit and evidence.

(3) The search warrant under which the officers proceeded was based on a false affidavit and invalid.

(4) That the evidence used as a basis for the search warrant was obtained illegally and the search warrant and any seizures thereunder are fruits of the poisonous tree.

(5) The vehicle illegally searched was within the curtilage of the petitioner's home.

(6) The search warrant was improperly executed and issued.

(7) The search was not incident to a valid arrest.

(8) The arrest of petitioner was invalid.

(9) The officer who made the original search was a Forsyth Deputy Sheriff searching in Rowan County and without authority and jurisdiction.

(10) Petitioner's Constitutional rights were not waived.

This the 25th day of July, 1974.

By: IRVIN B. TUCKER, JR.
Attorney for the Petitioner

On August 23, 1974, a voir dire hearing on a motion to suppress evidence by the petitioner was heard before Judge Exum, regular Judge of the Superior Court of Forsyth County, assigned to hold the courts of the 21st Judicial District composed of Forsyth County.

After the voir dire hearing, Judge Exum made findings of fact and conclusions of law and denied the petitioner's motion to suppress. The petitioner excepted. R. pp. 39-45.

The petitioner entered a plea of not guilty to the charge of larceny of the Gunter dogs in Case 72CR47396 as set forth in the warrant and was tried by a judge and a jury.

The petitioner's conviction and sentence of imprisonment was affirmed by the North Carolina Court of

Appeals. (Appendix, Exhibit B) The opinion of the North Carolina Court of Appeals stated:

> "Therefore, since the search warrant is valid on its face and the sworn allegations in the affidavit are sufficient to establish probable cause, it is not necessary for us to discuss the validity of the allegations in the affidavit or the credibility of the affiant. We hold the search of the defendant's automobile and the seizure of the leather dog leash pursuant to the search warrant was proper and the trial court did not err in denying the defendant's motion to suppress the evidence."

In the petitioner's brief to the Court of Appeals, the petitioner argued at length that the leather dog leash seized from the locked trunk of the petitioner's automobile, (while the automobile was in the yard of the petitioner's mother—where the petitioner also lived) was illegal, in violation of the petitioner's rights under the Fourth and Fourteenth Amendments of the Constitution of the United States (petitioner's brief filed with the North Carolina Court of Appeals, pp. 6-36). The petitioner appealed to the Supreme Court of North Carolina on the grounds that the petitioner's right against unreasonable search and seizure guaranteed by the Fourth Amendment to the Constitution of the United States made obligatory on the states by the Fourteenth Amendment was violated and set forth eighteen reasons why the petitioner's Constitutional rights had been so violated.

The petitioner's notice of appeal to the Supreme Court of North Carolina is hereto attached and marked "Exhibit C."

The petitioner, to support his appeal to the Supreme Court of North Carolina, filed a supplementary brief in

which he pointed out to the Supreme Court of North Carolina his contention that the Court had violated his rights guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States by admitting evidence of the leash found locked in the trunk of the petitioner's automobile, while the automobile was in the yard of the petitioner's mother, where the petitioner also lived. The petitioner, in support of his appeal to the Supreme Court of North Carolina, referred that Court to the argument of petitioner in his brief filed with the North Carolina Court of Appeals and in addition, called the Court's attention to *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), which stated that the "plain-view" doctrine may not be extended to a general exploratory search. The petitioner also called to the attention of the North Carolina Supreme Court that the "plain-view" doctrine does not apply where the incriminating nature of the evidence discovered was not apparent by a mere inspection, Annot., 29 L.Ed.2d 1067 at Page 1073, concerning *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969), Page 571 (petitioner's supplementary brief upon appeal to the Supreme Court of North Carolina, p. 5).

The petitioner also filed a petition for certiorari with the Supreme Court of North Carolina in which the petitioner pointed out that:

1. The decision of the North Carolina Court of Appeals sets a precedent barring the petitioner from showing that the facts set forth in the affidavit to establish probable cause for the issuance of the search warrant was illegally obtained and is against the authoritative decisions of the United States Supreme Court and should not be allowed to become the law of the State of North Carolina.

The petitioner's petition for certiorari to the Supreme Court of North Carolina pointed out that if the decision of the North Carolina Court of Appeals in this case is allowed to stand and become a precedent, then the State will be able to use illegally obtained evidence as a basis for a search warrant by merely failing to state the facts in the affidavit which would show the illegality and thus use the fruits of the poisonous tree or illegally obtained evidence contrary to the decision of this Court in *Silverman* v. *United States,* 365 U.S. 505, 5 L.Ed.2d 734, 81 S.Ct. 679 (1961), *Wong Sun* v. *United States,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963), *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 64 L.Ed.2d 319, 40 S.Ct. 182 (1920).

2. That the decision of the North Carolina Court of Appeals validated a search warrant which showed on its face that the search warrant was issued almost 12 hours before the affidavit.

3. That the holding of the North Carolina Court that the petitioner could not show facts which disclose statements in the affidavit are untrue is against the reasoning of the more authoritative and better opinions and the rule generally followed in federal court. The federal rule that should be followed was pointed out to the North Carolina Supreme Court as *United States* v. *Hunt,* 396 F.2d 888 (5th Cir. 1974).

On June 26, 1975, the petitioner's appeal and his petition for writ of certiorari upon motion of the Attorney General was dismissed. (Appendix, Exhibit A)

RELEVANT FACTS

On voir dire held by the Court on the defendant's Motion to suppress, the following facts were developed:

On the 21st day of October, 1972, George O. Gunter was in possession of two dogs and the owner of one dog.

The dogs were coon hounds. The last time Gunter saw the dogs was when he put them in a dog box, which was on the back of his pickup truck around 7:00 or 7:30 p.m. (R. p. 24).

One of the dogs was owned by George O. Gunter's brother and had a homemade leash on him (R. p. 24).

Gunter put the dogs into the box and went into the house to drink a cup of coffee and get some more clothes preparatory to going hunting. When he came back, he found that the tailgate of the truck was down and the dogs were gone (R. p. 24).

After Gunter missed the dogs, he called the Sheriff's Department and reported the dogs as stolen to Mr. Weaver (R. p. 25).

George O. Gunter lived in Winston-Salem, North Carolina (R. p. 24), and he and Mr. Weaver got in touch with Chief of Police Paul Wilson in East Spencer and went to the location of Mr. Brannon's mother's house (R. p. 25).

Michael Gray Weaver was a Deputy Sheriff of Forsyth County. East Spencer is in Rowan County (R. p. 13).

Forsyth Deputy Sheriff Weaver and East Spencer Chief of Police Wilson went to Mrs. Brannon's house and stated that they had a warrant for Calvin Brannon and asked her if they could look through the house; and she stated, "Yes" (R. pp. 10, 13).

Chief of Police Wilson of East Spencer remained in the house while Forsyth County Deputy Weaver went outside and searched. Chief of Police of East Spencer was not with either George O. Gunter or Deputy Sheriff

Weaver of Forsyth County when the leash was first seen in the trunk (R. pp. 17, 21).

Forsyth County Deputy Sheriff Weaver searched around the back of the house where Calvin Brannon and his mother lived (R. p. 11).

The defendant lived with his mother, Hattie Brannon, in East Spencer in Rowan County on October 21 and 22 of 1972 (R. pp. 32, 33).

The defendant's 1965 Oldsmobile, when Officer Weaver searched it in the backyard, was where it was usually parked. There was a chain-link fence along the street pavement, and the fence went around the house and took a right angle. Just beyond the car was a pony stable and just between the car and the next street was a chicken lot owned by Mrs. Brannon. The defendant's car was a white 1965 Oldsmobile and on that night was in the approximate position as shown on defendant's voir dire 2 (R. p. 35).

While Chief of Police of East Spencer was in the house with Mrs. Hattie Brannon, Forsyth County Deputy Weaver searched the defendant's 1965 Oldsmobile, which was sitting within the curtilage of the home where he and his mother lived (R. pp. 11, 12).

George O. Gunter was brought over and shown the leash through a hole in the car trunk but could not identify it at that time (R. pp. 27, 28).

At the time George O. Gunter and Forsyth County Deputy Sheriff Weaver made the illegal search of the defendant's automobile, within the curtilage of the backyard of the defendant and his mother's home, the officer was proceeding under a void warrant that charged that the defendant on September 26, 1972, did

unlawfully, willfully, and feloniously attempt to commit a felony, to wit: larceny; to unlawfully, willfully, and feloniously steal, take, and carry away two coon dogs of George O. Gunter, of the value of THREE HUNDRED FIFTY ($350.00) DOLLARS, with the felonious intent to permanently deprive the owner thereof and convert the same to his own use (R. pp. 15, 31).

There were no findings of fact of any kind set forth in the Complaint which was a basis of the arrest warrant (R. p. 31).

After Officer Weaver and George O. Gunter had illegally searched the defendant's vehicle parked within the curtilage of his dwelling, they in company with Paul Wilson, Chief of Police of East Spencer, went to the Magistrate in Salisbury, North Carolina, and obtained a search warrant (R. pp. 14, 26).

Gunter, Chief Wilson, and Deputy Weaver all went to Salisbury (R. pp. 14, 26).

The search warrant for the defendant's white Oldsmobile stated that a leather dog leash, which had been used in the commission of crime of larceny of dogs, was located in the defendant's automobile at the residence of the defendant and his mother; and that the facts upon which this information was based, was obtained from "personal information from George O. Gunter, 2124 New Walkerton Road, Winston-Salem, North Carolina, owner of the property in question who has seen the property in question and subject's vehicle at the above location" (R. pp. 28, 29).

George O. Gunter testified at the first trial that he did not look into the car trunk until it was opened, and that was when the officers came back with the search

warrant; until then he did not get close to the car or look into it (R. p. 32).

The best that Gunter could do at the second trial after listening to the officers testify, was to change his testimony to state that he did see into the car trunk through the hole in the trunk while the car was in the defendant's backyard and within the curtilage and before the search warrant was obtained; but he did not recognize the leash and identify it as set forth in the Affidavit from which the search warrant was obtained, and he did not tell the officers that the leash was his at the time (R. p. 27).

The search warrant was improperly executed since Paul Wilson, the Affiant, signed the warrant as Magistrate (R. p. 30).

The warrant was executed at 1:20 a.m., but the Affidavit upon which the warrant was based was not sworn to until 1:30 p.m. The warrant was issued without any Affidavit at all (R. pp. 28, 29).

The return on the search warrant discloses that it was served on October 22, 1972, at 2:00 a.m., taking into custody a leather dog leash (R. p. 30). At the time the officers and Gunter went for the search warrant, Calvin Brannon had not been seen. When the officers got back with the search warrant, he was there out in the street (R. pp. 21, 22).

After the defendant was put under arrest under the void arrest warrant, the officer stated that he gave permission to search the vehicle and gave the conclusion that he helped; however, the officers were unable to state any act that the defendant did to help unlock the trunk except to say, "Go ahead, open it. Do it; you can do

what you want to," and, "Let's go over there and open it." (R. pp. 19, 22).

After the defendant had been arrested and then served with the search warrant, the vehicle standing within the curtilage of defendant and his mother's home was searched; and the trunk was again opened and the dog leash identified by Gunter was seized (R. pp. 19, 20).

Forsyth County Deputy Sheriff Weaver after making the illegal search of the defendant's vehicle, within the curtilage of his home by opening the trunk of the vehicle and observing and getting out the leash, put the leash back in the hopes that they could then go get a search warrant and make legal what they had already done illegally (R. p. 16).

Mary B. Thompson and Vera Brannon testified that the defendant did not give the officers permission to search (R. pp. 35, 38).

Hattie H. Brannon, mother of the defendant, testified that she did not give the officers permission to search anywhere before they obtained the search warrant (R. pp. 32, 33).

The Gunter dogs were never found (R. p. 23).

The leash identified as State's Exhibit Number One was introduced into evidence under a continuing objection allowed the defendant by the Court (R. p. 45).

REASONS FOR GRANTING WRIT

I. The decision of the North Carolina Supreme Court dismissing the appeal and the petition for certiorari to the North Carolina Supreme Court, from the decision of the North Carolina Court of Appeals

is in conflict with the applicable decisions of this Court.

1. The decision allowed the illegally obtained evidence which is barred as the fruits of the poisonous tree to be introduced into evidence against the petitioner.

The doctrine of the fruits of the poisonous tree has become a part of our jurisprudence and must remain so if a rule of law is to continue in this great land of ours. This decision ignores this salutary doctrine and it is unthinkable that it should be allowed to stand.

The petitioner was convicted by the introduction of a homemade dog leash into the evidence in spite of the petitioner's motion to suppress (R. pp. 5, 6) and objection to the evidence (R. p. 45).

The evidence disclosed that Officer Weaver and George O. Gunter had illegally searched the petitioner's vehicle parked within the curtilage of his dwelling and that after the illegal search, they (in company with Paul Wilson, Chief of Police of East Spencer) went to the magistrate in Salisbury, North Carolina and obtained a search warrant (R. pp. 14, 26).

The authority for the original search by George O. Gunter and Forsyth County Sheriff Weaver of the petitioner's automobile within the curtilage of the backyard of the petitioner's mother's home, was a warrant that charged that the petitioner, on September 26, 1972, did unlawfully, willfully, and feloniously attempt to commit a felony, to wit: larceny; to unlawfully, willfully and feloniously steal, take, and carry away two coon dogs of George O. Gunter of the value of $350.00, with the felonious attempt to permanently deprive the

owner thereof and convert the same to his own use (R. pp. 15, 31).

The warrant of arrest, upon which the officer and George O. Gunter were proceeding, was not supported by an affidavit stating facts as a basis for the arrest warrant (R. p. 31).

The arrest warrant was obviously invalid since it did not contain the factual basis necessary to support the search and seizure of the leash. *Giordenello* v. *United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), *Whiteley v. Warden of Wyoming Penitentiary,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

The search warrant used as a basis for the search stated that the leash was located in the petitioner's automobile at the residence of the petitioner and his mother; and the facts upon which this information was based was obtained from "personal information from George O. Gunter, 2124 New Walkerton Road, Winston-Salem, North Carolina, owner of the property in question who had seen the property in question and subject's vehicle at the above location" (R. pp. 28, 29).

The burden is upon the State to prove any waiver of Constitutional rights to be freely and intelligently given without coercion, duress, or fraud; and the presumption is against the waiver of fundamental rights.

There was a sharp conflict between the State's witnesses, Weaver and Wilson as to whether Mrs. Brannon's consent to search was limited to the house or whether it encompassed the entire premises. Officer Weaver, who made the illegal search of the vehicle within the curtilage, stated that Mrs. Brannon's consent to the search was limited to permission to look in the

house for the petitioner Brannon (R. p. 10). Officer Wilson stated that Mrs. Brannon gave Officer Wilson the right to search any place he wanted to (R. p. 17).

Hattie H. Brannon, mother of the petitioner, testified that she did not give the officers permission to search anywhere before they obtained the search warrant (R. pp. 32, 33).

It, therefore, is without caval that what ever consent Mrs. Brannon gave was limited personally to Officer Wilson and did not extend to Officer Weaver. Officer Weaver's own testimony limited the consent to search to the house itself; and the search that he made of the vehicle within the curtilage of the home was completely without the consent of Mrs. Brannon, who according to Weaver's testimony, as heretofore stated, was limited to the house.

It, therefore, is clear that Mrs. Brannon's consent as far as Officer Weaver, who made the search, was concerned was limited to the house itself.

However, there is no doubt that the officers obtained whatever consent they did receive because of the coercion of the invalid arrest warrant (R. pp. 17, 31).

The alleged consent was no more than acquiescence to a claim of lawful authority under the coercion of an invalid warrant.

The Conclusion of Law Number 2 of the trial Court (R. p. 43) that Mrs. Hattie Brannon voluntarily consented to allow the law enforcement officers to search the premises, including the home itself and the curtilage of the automobile, is without basis of fact and is completely contrary to the legal authorities which will be hereinafter discussed.

It is uncontradicted that at the time the defendant gave his alleged consent to search, he was under arrest (R. pp. 19, 20). Also see Finding of Fact 16 of the trial (R. p. 42). The testimony of Mary B. Thompson that after the defendant was arrested out on the street, he was handcuffed, is uncontradicted (R. p. 35).

The officers' claim of consent of the defendant to search the vehicle was sharply disputed by Mary B. Thompson and Vera Brannon, who testified that the defendant did not give the officers permission to search (R. pp. 35, 38).

After the defendant was put under arrest under the void arrest warrant, the officer stated that he gave permission to search and gave the conclusion that he helped; however, the officers were unable to state any act that defendant did to help unlock the trunk except to say, "Go ahead, open it. Do it; you can do what you want to," and "Let's go over there and open it up" (R. pp. 20, 22).

Certainly, the foregoing words do not amount to assistance in opening the trunk, but are only another way of saying that the defendant consented and, therefore, there was no basis whatsoever for the finding of the Court that the defendant "assisted" in opening the trunk. (Finding of Fact 16) (R. pp. 42, 43).

Although the officers testified that the defendant helped them get into the trunk (R. p. 22), there was no explanation of what he did to help or how he could have helped with the handcuffs on (R. p. 35), or the handcuffs behind his back (R. p. 35).

Although possibly the fact that the defendant is under arrest does not, standing alone, render the consent invalid, 9 ALR 3d 875-876, and the warnings required

in *Miranda* v. *Arizona,* 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) are not obligatory before obtaining consent to search, however, the fact that the defendant consents after arrest, tends to indicate that the consent was not voluntary. 9 ALR 3d 875-876.

Many cases state or recognize that the burden on the government to prove the voluntary nature of a consent to a search is particularly heavy where the consenter was under arrest at the time of the consent. 9 ALR 3d 876.

Where in addition to the circumstance that the consenter was under arrest at the time of an allegedly involuntary consent to a search, other factors, such as handcuffing, appear, the unlikelihood that the consent was freely made is considered by the Courts as strong. 9 ALR 3d 877.

Here not only was the defendant under arrest at the time of the alleged consent but was handcuffed and the officers were proceeding under an invalid arrest warrant in addition to an invalid search warrant.

The incredible statement of these overzealous officers that the defendant helped in the search of the automobile is certainly too incredulous to tip the scales against the presumption of non-waiver of constitutional rights.

Here the officers not only served the invalid search warrant but introduced it into evidence (R. pp. 28-30).

As was said in *Hoover* v. *Beto,* 439 F.2d 913 (5th Circuit 1971) at page 920:

> "The officer's return on the back of the search warrant is record evidence that the search was conducted in reliance on the warrant. Conceding *argu-*

> *endo,* however, that the search can be justified on the basis of consent, we cannot agree that Hoover voluntarily consented to the search."

In *Hoover* v. *Beto, supra,* the Court further said, at page 920, as follows:

> "It is conceivable that a person could give a voluntary and uncoerced consent to search even though he had been informed that the officers had a search warrant. But the state would bear the burden of showing that the consent was given sufficiently independent of the warrant to remove the taint of its coercive nature."

In the case of *Bumper* v. *North Carolina,* 391 US 543, 20 L.Ed.2d 797, 88 S.Ct. 788 (1968), the United States Supreme Court, in reversing the conviction of Bumper and in holding that there could be no consent after the official conducting the search asserted he possessed a warrant, said:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he had the burden of proving that the consent was in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out the warrant was invalid. The result can be no difference when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show there was in fact any warrant at all.
>
> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion-albeit, colorably lawful coercion. Where there is coercion, there cannot be consent."

Here the defendant was under the coercion of an invalid warrant and an invalid search warrant, and any statement or act that he made pursuant thereto was colorably coercion pursuant to a show of lawful authority by the officers; and the State has not borne its burden of showing that the consent was sufficiently independent of the illegal warrant and the illegal search warrant to remove the taint of its coercive nature.

From the foregoing facts and authorities, it appears to be crystal clear that there was no basis in law or in fact for the Conclusions of Law 2 and 5 of the trial Court (R. pp. 43, 44) that Hattie Brannon and the defendant voluntarily consented to the search. The State failed to carry its burden and showed no more than acquiescence to a claim of lawful authority. Certainly, the State has not carried its burden sufficiently to show that the consents were independent of the warrants to remove the taint of the invalid warrants' coercive nature.

Schneckloth v. *Bustamonte,* 412 US 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973) is of no help whatsoever to the State's contention. Neither of these cases involves consent given after arrest or consent given after a show of lawful authority, either by an arrest warrant or a search warrant. The real issue in *Schneckloth* v. *Bustamonte,* supra, was whether there was a duty on the part of the officer to warn a person consenting to a search of his right not to consent.

In this case now before the Court, the Hattie Brannon alleged consent was acquiescence to claim of lawful authority, which turned out to be an invalid warrant; and the alleged consent on the part of the defendant was an acquiescence to a claim of lawful au-

thority, which turned out to be an invalid arrest warrant and an invalid search warrant.

The initial discovery of the leash did not justify the invoking of the "plain view" doctrine, because the officers did not have the right to search as heretofore set forth.

But even if the officers had the authority to be in the curtilage where the petitioner's automobile was standing, which is denied, the "plain view" doctrine would not apply; because the officers did not discover the leash inadvertently, but through a general exploratory search of the petitioner's automobile. Officer Weaver testified that while looking for the petitioner under the void and deficient arrest warrant, he shined his light through a crack in the trunk lid and saw the leash, which was not identified by Gunter at that time. [See finding of facts 12, 13, 14 and 15 (R pp 41-42)].

The search described by the officer was not inadvertent, but a general exploratory search, and the "plain view" doctrine did not apply. In *Coolidge* v. *New Hampshire,* 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971), the Supreme Court of the United States said at page 466 as follows:

> "Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object."

The Court in *Coolidge* v. *New Hampshire* further stated at page 466:

> "The 'plain view' doctrine may not be used to extend a general exploratory search from one ob-

ject to another until something incriminating at last emerges."

Also, the "plain view" doctrine does not apply where the incriminating nature of the evidence discovered was not apparent by mere inspection. (Annotation 29 L Ed 2d 1067 at page 1073, concerning Opinion, *Stanley* v. *Georgia,* 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), page 571.

Here the evidence and the finding of facts by the Court disclose that the identity of the leash was not established before the search warrant was procured. [See finding of facts 12, 13, 14 and 15 (R pp 41-42)].

The North Carolina Court of Appeals, by deciding that the petitioner could now show that the allegations in the affidavit supporting the search warrant were invalid, swept under the rug the clear fact that the search warrant was based on illegally obtained evidence. The evidence of the dog leash was barred as fruits of the poisonous tree under *Silverman* v. *United States,* 365 U. S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961), *Wong Sun* v. *United States,* 371 U. S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), *Alderman* v. *United States,* 394 U. S. 165, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969), *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385, 64 L. Ed. 2d 319, 40 S. Ct. 182 (1920). *Brown* v. *Illinois,* 17 Cr. L. 3145 (1975).

The denial of the petitioner's right to show that the evidence upon which the search warrant was based was illegal is a complete repudiation of the doctrine of the fruits of the poisonous tree, unless this court hears this case and repudiates the decision of the North Carolina Court of Appeals, a precedent will be set not only in North Carolina but in other states which will

encourage officers to make an illegal search, discover evidence during the illegal search and have the search declared legal because of the inability of the victim of the search to show the true illegal origin of the facts shown in the search warrant affidavit.

2. Not only was the search warrant used as an authority for the search and seizure of the leash invalid as a fruit of the poisonous tree but the search warrant was clearly invalid because it was issued without an affidavit.

The search warrant was issued at 1:20 a.m., but the affidavit upon which the search warrant was based was not sworn to until 1:30 p.m. (R. pp. 28-30). The search warrant and the affidavit show on their face that at the time the search warrant was issued, the affidavit supporting the same had not been sworn to. In fact, the search warrant and the affidavit show on their face that the affidavit was executed and sworn to more than 12 hours after the search warrant was issued.

The trial judge made no findings of fact that the affidavit was signed before the issuance of the warrant (R. pp. 39-43), and the testimony of the witness Paul G. Wilson who signed the affidavit, as shown on R. p. 19, contains no statement that he signed the affidavit before the warrant was issued.

Actually, the testimony of the witness Wilson shows that the officers were in such a hurry that the affiant signed the search warrant in the magistrate's place and the magistrate signed the warrant in the affiant's place. With all this going on, it is reasonable to assume that the affidavit was not signed prior to the execution of the search warrant and that it was signed

at a later time as shown on the face of the warrant and affidavit (R. p. 19).

Certainly there are no facts which justify the decision of the North Carolina Court of Appeals that "the trial Judge's finding and conclusion that the search warrant 'was issued upon probable cause as set out in the Affidavit to obtain the warrant' is supported by evidence adduced at the voir dire hearing and is conclusive on appeal."

Judge Exum's Conclusion of Law No. 4, wherein he stated "the search warrant offered in evidence as State's Exhibit 2 was issued upon probable cause as set out in the Affidavit to obtain a search warrant as amplified by the testimony of Chief Wilson at the voir dire hearing and is a valid search warrant notwithstanding the fact that the magistrate signed the warrant in the space set aside for the affiant and that Chief Wilson signed in the space set aside for the signature of the magistrate (R. p. 44) is not based upon any finding of fact or any evidence that the affidavit to obtain the search warrant was not executed at the time set forth on the face of the warrant.

Actually, the judge's Conclusion of Law No. 4 was not intended to cover the lack of an existing affidavit at the time of the issuance of the search warrant, but specifically referred to the mix-up in the signatures on the warrant itself.

The search warrant was invalidly issued without an affidavit, and for this reason the North Carolina Court of Appeals committed error in its decision contrary to the decision of this Court in *Aguilar* v. *Texas,* 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964).

Actually, it would seem that if the petitioner is to be precluded, as the North Carolina Court of Appeals held, from contesting the facts set forth in the affidavit as to truth and as to whether illegally obtained, that the petitioner should be fed out of the same spoon as the State; and the State should be bound by the facts shown on the face of the warrant and affidavit. This principle is particularly applicable in this case, because there was no factual testimony that the times set forth in the affidavit and warrant were not correct and the findings of fact by the judge on this point and even the Conclusion of Law relied on by the Court of Appeals does not specifically address itself to the curing of this fatal defect shown on the face of the affidavit and search warrant.

II. The decision of the North Carolina Supreme Court dismissing the appeal and the petition for certiorari to the North Carolina Supreme Court, from the decision of the North Carolina Court of Appeals decided a question of substance not theretofore determined by this Court.

In addition to allowing the fruits of the poisonous tree to become evidence in this case by precluding the petitioner from showing the illegal source of the evidence, contrary to the decisions of this Court, the North Carolina Court of Appeals also closed the door upon the right of the petitioner to show the truth of the facts set forth in the search warrant affidavit.

The decision of the Court of Appeals gives carte blanche to officers to make false statements in the affidavit and then blandly prevent the victim of the search from showing the falsehood because it does not appear on the face of the affidavit supporting the search warrant.

A diligent search by counsel for the petitioner has not disclosed any decision by this Court upon this important point of law.

68 Am. Jur. 2d *Search and Seizures* § 66 sets forth that the Supreme Court of the United States has not directly passed upon this question. Some state courts have taken the view that the credibility of the affiant cannot be disputed and other state courts have held to the contrary.

The rule generally followed in federal courts is well-stated in *United States* v. *Hunt,* 396 F. 2d 888 (5th Cir. 1974). This case clearly states that the truth of the affidavit can be inquired into, and if the false statements are intentional, the warrant is invalid whether or not the statements are material to probable cause. If the warrant contains false statements not intentionally made to mislead, but are material to the establishment of probable cause, the material falsehoods must be excised from the warrant and the remaining information examined to see if it independently constitutes probable cause.

The search warrant for the petitioner's white Oldsmobile stated that a leather dog leash, which had been used in the commission of the crime of larceny of dogs, was located in the petitioner's automobile at the residence of petitioner and his mother; and that the facts upon which the informaiton was based, was obtained from "personal information from George O. Gunter, 2124 New Walkertown Road, Winston-Salem, North Carolina, owner of the property in question who has seen the property in question and subject's vehicle at the above location" (R. pp. 28, 29).

The evidence that the facts set forth in the affidavit supporting the search warrant were so overwhelmingly

false that the trial Judge found that Gunter could not make a positive identification looking in through the hole in the trunk lid (Findings of Fact 14), (R. p. 42).

The trial judge made this finding of fact that Gunter could not make a positive identification, because Gunter had testified on a previous trial that he did not look into the trunk until it was opened, and that was when the officers came back with the search warrant; until then, he did not get close to the car or look into it (R. p. 32).

The best that Gunter could do at the second trial, after listening to the officers testify, was to change his testimony to state that he did see into the car trunk through the hole in the trunk while the car was in the petitioner's backyard and within the curtilage and before the search warrant was obtained; but he did not recognize the leash and identify it as set forth in the affidavit from which the search warrant was obtained; and he did not tell the officers that the leash was his at the time (R. pp. 27, 28).

There is absolutely no basis for the finding of the Court that "Gunter remarked to Deputy Sheriff Weaver, 'that appears to be my leash', or words to that effect . . . " (Finding of Fact 14) (R. p. 42).

Actually, Gunter's testimony on this point, although it was changed drastically to please the police officers, was as follows:

> "After the trunk was opened, I saw this leash that I could identify. Through the hole, I saw some collars and a leash, but I couldn't fully identify the leash until we got the trunk opened. But, it looked like it when I saw it through the hole. I saw the leash when the trunk was opened." (R. pp. 27, 28)

It is perfectly obvious if Gunter thought that it was his leash, he kept it to himself and did not identify it to the officers. When the police officer went before the magistrate and swore to the affidavit which supports the search warrant, he stated an untruth when measured by the testimony of Gunter, both at the first and the second trials. The court was completely in error in finding that he remarked to the Deputy Sheriff, "That appears to be my leash," or words to that effect.

The finding of the court that Gunter made the foregoing remarks to the Deputy Sheriff is a complete contradiction of the facts set forth in the warrant which unequivocally state that Gunter furnished personal information that he had seen the property in question located in petitioner's automobile located at the residence of petitioner and his mother (R. p. 28).

The learned trial judge did not have any basis for his finding of fact set forth above, because Forsyth County Deputy Sheriff Weaver testified that Gunter said, "That is my dog leash" (R. p. 12) and Chief of Police Wilson stated that Gunter saw the dog leash (R. p. 19).

It is therefore uncontradicted that Gunter did not tell the officers anything, and that Wilson swore to what he wanted the facts to be, rather than what they were.

At the time Officer Wilson swore that Gunter had seen the property in question in the subject's vehicle at the location described, he had no basis whatsoever to make such a statement, which he stated was upon personal information from George O. Gunter. The statement was false, and without this information from Gunter, there was no probable cause to believe that the

leather leash used in commission of a crime was in the petitioner's automobile at 400 block Southern Street, East Spencer, North Carolina.

It is important that state courts not be allowed to emasculate the Fourth Amendment prohibition against unreasonable search and seizure by the devices that have been used in this case. It is important not only for this cause but for all causes in the future that this court consider and pass upon the right of the petitioner to attack the credibility of the affiant and it is respectfully submitted that *United States* v. *Hunt, supra,* sets forth the desirable rule. In any event, it is important that this court now speak out on this important issue which, in the petitioner's case, and in the case of others will prevent the state courts from circumventing the prohibition of the Fourth Amendment to the Constitution of the United States against unreasonable search and seizure.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment of the North Carolina Court of Appeals should be allowed.

Respectfully submitted,

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